EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

No. 90-1972

FILED
DEC 26 1991
OFFICE OF THE CLER

# In the Supreme Court
OF THE
## United States
OCTOBER TERM 1991

UNITED STATES OF AMERICA,
*Petitioner,*
VS.
JOHN H. WILLIAMS, JR.,
*Respondent.*

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT**

# BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS ON THE MERITS IN SUPPORT OF RESPONDENT

DAN MARMALEFSKY
*Counsel of Record*
WARRINGTON S. PARKER, III
LAURA FASHING
Hufstedler, Kaus & Ettinger
355 South Grand Avenue
45th Floor
Los Angeles, California 90071-3107
Telephone: (213) 617-7070

Bowne of Los Angeles, Inc., Law Printers (213) 627-2200

BEST AVAILABLE COPY

## TABLE OF CONTENTS


| | Page |
|---|---|
| INTEREST OF AMICUS CURIAE | 1 |
| SUMMARY OF ARGUMENT | 1 |
| ARGUMENT | 4 |
| I. | |
| ADOPTION OF PETITIONER'S ARGUMENT WOULD FUNDAMENTALLY IMPAIR THE STRUCTURAL PROTECTIONS OF OUR GRAND JURY SYSTEM | 4 |
| II. | |
| THE COURT OF APPEALS' STRAIGHTFORWARD APPLICATION OF ITS SUPERVISORY POWERS AND OF THIS COURT'S DECISION IN *BANK OF NOVA SCOTIA* SHOULD BE UPHELD | 6 |
| A. The Duty to Present Substantial Exculpatory Evidence that Clearly Negates Guilt Fairly Protects the Interests of the Grand Jury, the Prosecution and the Court | 6 |
| 1. Historic Role of the Grand Jury | 6 |
| 2. Role of the Prosecutor | 9 |
| 3. The Court's Supervisory Powers | 11 |
| B. This Court's Decision in *Bank of Nova Scotia* | 12 |
| C. The Requirement that Prosecutors Present Substantial Exculpatory Evidence that Clearly Negates the Target's Guilt is Consistent with this Court's Prior Exercise of Supervisory Powers | 14 |
| 1. Development of the Standard | 14 |

TABLE OF CONTENTS


| | Page |
|---|---|
| 2. The Standard Appropriately Applies the Court's Supervisory Authority ..... | 16 |
| III. | |
| THE REQUIREMENT THAT A PROSECUTOR PRESENT SUBSTANTIALLY EXCULPATORY EVIDENCE THAT CLEARLY NEGATES A TARGET'S GUILT IMPOSES NO SIGNIFICANT BURDEN AND REASONABLY BALANCES COMPETING INTERESTS | 19 |
| A. Petitioner Fails To Demonstrate Any Significant Burden ..... | 19 |
| 1. Claimed impact on judicial resources .. | 19 |
| 2. Claimed difficulty in following or applying the standard ..... | 21 |
| 3. The Claim That Prosecutors Already Have Sufficient Incentive Not To Indict When A Conviction Is Remote ..... | 23 |
| 4. Impact of this obligation on white collar prosecution ..... | 24 |
| 5. The claim that administrative remedies provide a sufficient safeguard against grand jury abuse ..... | 27 |
| B. The Penalties And Injuries Attendant To An Indictment Justify Any Additional Burden | 27 |
| IV. | |
| THE COURT SHOULD AFFIRM DISMISSAL OF RESPONDENT'S INDICTMENT..... | 28 |
| CONCLUSION ..... | 30 |




## TABLE OF AUTHORITIES

### Cases


| | Page |
|---|---|
| *Ballard v. United States*, 329 U.S. 187 (1946) .... | 11, 12 |
| *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988) ..... | *passim* |
| *Berger v. United States*, 295 U.S. 78 (1935) ..... | 9 |
| *Blair v. United States*, 250 U.S. 273 (1919)..... | 8 |
| *Brady v. Maryland*, 373 U.S. 83 (1963) ..... | 18, 21 |
| *Branzburg v. Hayes*, 408 U.S. 665 (1972) ..... | 8 |
| *Buzbee v. Donnelly*, 96 N.M. 692, 634 P.2d 1244 (1981) ..... | 20 |
| *Commonwealth v. Mayfield*, 398 Mass. 615, 500 N.E.2d 774 (1986) ..... | 20 |
| *Costello v. United States*, 350 U.S. 359 (1956)..... | 7, 10 |
| *County of Riverside v. McLaughlin*, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991) ..... | 27, 28 |
| *Doe v. DiGenova*, 779 F.2d 74 (D.C. Cir. 1985) ... | 8 |
| *Ex parte Bain*, 121 U.S. 1 (1887) ..... | 7 |
| *FDIC v. Mallen*, 486 U.S. 230 (1988)..... | 28 |
| *Frink v. State*, 597 P.2d 154 (Ala. 1979)..... | 20 |
| *Hale v. Henkel*, 201 U.S. 43 (1906) ..... | 6 |
| *Hochman v. Rafferty*, 831 F.2d 1199 (3d Cir. 1987), *cert. denied*, 485 U.S. 1022 (1988) ..... | 15 |
| *Hoffman v. United States*, 341 U.S. 479 (1951) .... | 6 |
| *In re American Continental Corporation/Lincoln Savings and Loan Securities Litigation*, U.S. Dist. Ct., D.Az., MDL Docket No. 834 ..... | 26 |

## TABLE OF AUTHORITIES

### CASES


| | Page |
|---|---|
| *In re Consolidated Columbia Savings and Loan Actions*, U.S. Dist. Ct., C.D. Cal., Master File No. CV 89-6538 SVW (Ex) | 26 |
| *In re Grand Jury Subpoena Duces Tecum Dated April 19, 1991*, 945 F.2d 1221 (2d Cir. 1991) | 26 |
| *In re Grand Jury Subpoena Duces Tecum*, 836 F.2d 1468 (4th Cir.), *cert. denied*, 487 U.S. 1240 (1988) | 26 |
| *Johnson v. Superior Court*, 15 Cal.3d 248, 124 Cal.Rptr. 32, 539 P.2d 792 (1975) | 20 |
| *Klopfer v. North Carolina*, 386 U.S. 213 (1967) | 27 |
| *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S.Ct. 2773, 115 L.Ed.2d 321 (1991) | 25 |
| *Marshall v. United States*, 360 U.S. 310 (1959) | 11 |
| *Martindell v. International Tel. & Tel. Corp.*, 594 F.2d 291 (2d Cir. 1979) | 26 |
| *McCarthy v. United States*, 394 U.S. 459 (1969) | 12 |
| *McNabb v. United States*, 318 U.S. 332 (1943) | 11 |
| *Mesarosh v. United States*, 352 U.S. 1 (1956) | 11 |
| *Miles v. United States*, 483 A.2d 649 (D.C. 1984) | 20 |
| *Napue v. Illinois*, 360 U.S. 264 (1959) | 18 |
| *Nelson v. State*, 628 P.2d 884 (Ala. 1981) | 20 |
| *Ostman v. Eighth Judicial District Court*, 816 P.2d 458 (Nev. 1991) | 20 |
| *People v. Abbatiello*, 129 Misc.2d 831, 494 N.Y.S.2d 625 (N.Y. Sup. Ct. 1985) | 20 |
| *People v. Scott*, 150 Misc.2d 297, 568 N.Y.S.2d 857 (N.Y. Sup. Ct. 1991) | 20 |




## TABLE OF AUTHORITIES

### CASES


| | Page |
|---|---|
| *State v. Adams*, 64 Haw. 568, 645 P.2d 308 (1982) | 20 |
| *State v. Bell*, 60 Haw. 241, 589 P.2d 517 (1978) | 20 |
| *State v. Coconino County Superior Court*, Div. II, 139 Ariz. 422, 678 P.2d 1386 (1984) | 20 |
| *State v. Couture*, 194 Conn. 530, 482 A.2d 300 (1984), *cert. denied*, 469 U.S. 1192 (1985) | 20 |
| *State v. Harwood*, 45 Or. App. 931, 609 P.2d 1312 (1980) | 20 |
| *State v. Moore*, 438 N.W.2d 101 (1989) | 20 |
| *State v. Nordquist*, 309 N.W.2d 109 (N.D. 1981) | 20 |
| *Stirone v. United States*, 361 U.S. 212 (1960) | 7 |
| *Strehl v. District Court of Salt Lake County*, 558 P.2d 597 (Utah 1976) | 20 |
| *United States v. Bagley*, 473 U.S. 667 (1985) | 21 |
| *United States v. Calandra*, 414 U.S. 338 (1974) | 7, 8, 23 |
| *United States v. Casamento*, 887 F.2d 1141 (2d Cir. 1989), *cert. denied*, 493 U.S. 1081 (1990) | 15 |
| *United States v. Ciambrone*, 601 F.2d 616 (2d Cir. 1979) | 7, 14 |
| *United States v. Davis*, 702 F.2d 418 (2d Cir.), *cert. denied*, 463 U.S. 1215 (1983) | 26 |
| *United States v. Dionisio*, 410 U.S. 1 (1973) | 7 |
| *United States v. Dorfman*, 532 F.Supp. 1118 (N.D. Ill. 1981) | 16, 24 |
| *United States v. Flomenhoft*, 714 F.2d 708 (7th Cir. 1983), *cert. denied*, 465 U.S. 1068 (1984) | 15, 24 |
| *United States v. GAF Corp.*, 596 F.2d 10 (2d Cir. 1979) | 26 |

TABLE OF AUTHORITIES

CASES


| | Page |
|---|---|
| *United States v. Gavran*, 620 F.Supp. 1277 (E.D. Wis. 1985), *aff'd* 845 F.2d 1023 (7th Cir. 1988) | 16 |
| *United States v. Isgro*, 751 F.Supp. 846 (C.D. Cal. 1990) | 5, 16 |
| *United States v. Lame*, 716 F.2d 515 (8th Cir. 1983) | 15 |
| *United States v. Law Firm of Zimmerman & Schwartz, P.C.*, 738 F.Supp. 407 (D.Col. 1990), *rev'd on other grounds sub. nom. United States v. Brown*, 943 F.2d 1246 (10th Cir. 1991) | 24 |
| *United States v. Lawson*, 502 F.Supp. 158 (D.Md. 1980) | 17 |
| *United States v. Mandujano*, 425 U.S. 564 (1976) | 9 |
| *United States v. Martino*, 825 F.2d 754 (3rd Cir. 1987) | 8 |
| *United States v. Mechanik*, 475 U.S. 66 (1986) | 13 |
| *United States v. Moon*, 532 F.Supp. 1360 (S.D.N.Y. 1982) | 24 |
| *United States v. Page*, 808 F.2d 723 (10th Cir. 1987), *cert. denied*, 482 U.S. 918 (1987) | 15, 28, 29 |
| *United States v. Phillips Petroleum Co.*, 435 F.Supp. 610 (N.D. Okl. 1977) | 5, 17, 18 |
| *United States v. Provenzano*, 440 F.Supp. 561 (S.D.N.Y. 1977) | 17 |
| *United States v. Reid*, 911 F.2d 1456 (10th Cir. 1990), *cert. denied*, 111 S.Ct. 990 (1991) | 15, 16, 29 |
| *United States v. Roberts*, 481 F.Supp. 1385 (C.D.Cal. 1980) | 24 |




TABLE OF AUTHORITIES

CASES


| | Page |
|---|---|
| *United States v. Santucci*, 674 F.2d 624 (7th Cir. 1982), *cert. denied*, 459 U.S. 1109 (1983) | 8 |
| *United States v. Sells Engineering, Inc.*, 463 U.S. 418 (1983) | 7, 12 |
| *United States v. Serubo*, 604 F.2d 807 (3d Cir. 1979) | 27 |
| *United States v. Short*, 1991 U.S. Dist. LEXIS 16380 (D.D.C. 1991) | 5 |
| *United States v. Udziela*, 671 F.2d 995 (7th Cir.), *cert. denied*, 457 U.S. 1135 (1982) | 10 |
| *Vasquez v. Hillery*, 474 U.S. 254 (1986) | 7, 12 |
| *White v. United States Postal Service*, 768 F.2d 334 (Fed. Cir. 1985) | 28 |
| *Wood v. Georgia*, 370 U.S. 375 (1962) | 7, 8 |
| *Young v. United States ex. rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987) | 9, 12 |


**Constitutional Provision**


| | |
|---|---|
| Amend. V | 5, 6 |


**Statutes**


| | |
|---|---|
| 18 U.S.C.A. § 3322(a) | 26 |
| 21 U.S.C.A. § 853(e) (Supp. 1991) | 28 |
| 21 U.S.C.A. § 853(f) (Supp. 1991) | 28 |
| Cal. Code of Civil Procedure § 343 | 25 |
| 22 Okl. Stat. Ann. § 335 | 20 |

TABLE OF AUTHORITIES

**Rules and Regulations**


| | Page |
|---|---|
| Fed. R. Civ. P. 24 | 26 |
| Fed. R. Crim. P. 6 | 2, 10 |
| Fed. R. Crim. P. 11 | 12 |
| Fed. R. Crim. P. 29 | 21 |
| 12 C.F.R. § 563.180(d) | 26 |
| 48 C.F.R. § 9.407-2(b) (1990) | 28 |


**Miscellaneous**


| | Page |
|---|---|
| ABA/BNA, *Lawyers' Manual on Professional Conduct* Model Code of Professional Responsibility, DR 1-102(A)(5)(1991) | 9 |
| American Bar Association Project on Standards for Criminal Justice — The Prosecution Function (1971) | |
| Section 1.1(c) | 9 |
| Section 3.6(b) | 22 |
| Comprehensive Thrift and Bank Fraud Prosecution and Taxpayer Recovery Act of 1990, Pub. L. 101-647, § 2505, 104 Stat. 4789 (1990), codified as amended at 18 U.S.C.A. § 3293 (Supp. 1991) | 25 |
| 7 Department of Justice Manual (1991) | |
| Section 9-11.020 | 9 |
| Section 9-11.233 | 22 |
| Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), Pub. L. 101-73, § 963, 103 Stat. 504 (1989), codified as amended at 18 U.S.C.A. § 3293 (Supp. 1991) | 25 |




TABLE OF AUTHORITIES

MISCELLANEOUS


| | Page |
|---|---|
| National District Attorneys Association, *National Prosecution Standards* (1977) | |
| Standard 2.3(A) | 10 |
| Standard 14.2(D) | 23 |
| Note, *Powers of Federal Grand Juries*, 4 Stan. L. Rev. 68, 70-71 (1951) | 8 |
| 1 Wright, *Federal Practice and Procedure*, Criminal 2d § 101 (1991) | 8 |

No. 90-1972

# In the Supreme Court

OF THE

## United States

OCTOBER TERM 1991

---

UNITED STATES OF AMERICA,
*Petitioner,*

VS.

JOHN H. WILLIAMS, JR.,
*Respondent.*

---

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT**

---

**BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS ON THE MERITS IN SUPPORT OF RESPONDENT**

## INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia non-profit corporation with a nationwide membership of more than 5,000 lawyers and 25,000 affiliate members. NACDL was founded more than 25 years ago to promote study and research in the field of criminal defense law, to disseminate and advance the knowledge of the law in the field of criminal defense practice, and to encourage the integrity, independence and expertise of defense lawyers. Among NACDL's stated objectives is promotion of the proper administration of criminal justice, and consequently NACDL is concerned with the protection of individual rights and improvement of the criminal law, its practices and procedures. NACDL submits this brief because this case presents important issues concerning an individual's fundamental right to an independent and unbiased grand jury determination in the federal criminal justice system. NACDL is extremely concerned about any decision that would undermine or dilute this fundamental protection of individual liberty, as would adoption of the position asserted by petitioner in this case.

The Amicus Curiae Committee of NACDL has discussed this case and decided that the issues are of such importance to the criminal justice system that NACDL should offer its assistance to the Court. Both petitioner and respondent have consented to NACDL's participation as amicus curiae and their letters of consent have been filed with this Court.

## SUMMARY OF ARGUMENT

1. The decision of the Court of Appeals reflects an unexceptional balancing of the roles of the grand jury and the prosecutor, and the court's supervisory authority to preserve the integrity and fairness of the criminal justice system. The grand jury traditionally performs dual functions. It determines whether there is probable cause and protects citizens from government overreaching. The

grand jury consists of ordinary citizens, generally acting only part-time, who are not required to have any knowledge of the intricacies or complexities of either substantive or procedural criminal law. It relies in great part upon the evidence, facts and law as related to it by the prosecutor. A prosecutor's wide latitude in evidentiary presentations made to a grand jury is not unlimited. Both Rule 6 of the Federal Rules of Criminal Procedure and a court's supervisory powers prevent prosecutors from impinging upon the grand jury's independence and from presenting the evidence in a deliberately misleading manner. This Court has made clear that, upon a showing that the misconduct substantially influenced the grand jury's decision to indict, a district court may properly invoke its supervisory power to dismiss an indictment for prosecutorial misconduct in a grand jury investigation. Such a showing may occur in instances where a prosecutor has manipulated a witness' testimony or knowingly participated in a misleading and inaccurate grand jury presentation. The standard for determining prejudice and the requirement that the prosecutor know of the misleading and inaccurate nature of the grand jury presentation, as articulated by this Court in *Bank of Nova Scotia*, parallel the requirement articulated by lower courts that prosecutors must present substantial exculpatory evidence that clearly negates the target's guilt.

The essential elements of the requirement to present exculpatory evidence have been repeated in numerous published decisions. First, a prosecutor is not required to search for exculpatory evidence, or to present all evidence that might be considered exculpatory. Second, as part of its obligation not to mislead the grand jury or to engage in other fundamentally unfair tactics, the prosecution must make available or present to the grand jury substantial exculpatory evidence that clearly negates the target's guilt. This requirement effectively safeguards the grand jury's independence and acts as a check on prosecutorial



conduct without converting the grand jury process into a second trial on the merits or burdening the trial courts.

2. Petitioner has failed to demonstrate any significant burden flowing from this requirement. Petitioner's claim of an adverse impact is neither borne out in practice or theory. First, within the last 15 years, district courts across the country and at least five circuit courts of appeals have required prosecutors to meet the standard. In addition at least 15 states similarly require a prosecutor to present such evidence to a grand jury. In fact, an internal Department of Justice policy already requires adherence to this standard. Petitioner identifies no evidence of any demonstrable, adverse impact on the functioning of the criminal justice system, despite the many years during which courts have imposed this requirement. Second, given the nationwide application of *Bank of Nova Scotia*, it is unreasonable to conclude that application of the duty to present substantial exculpatory evidence in those circuits that have not yet adopted the rule will significantly affect the volume of pre-trial motions.

Petitioner's claim that the standard will be difficult for courts to apply or for prosecutors to follow is similarly unsubstantiated. The standard articulated by the lower courts is objective, and involves legal determinations similar to those made every day by trial judges. Nor is this obligation difficult for prosecutors, who under existing Department of Justice policy already must comply with this standard.

While petitioner has failed to substantiate its claim of undue burden, the penalties and injuries attendant to an indictment are manifest. For example, the government may limit a defendant's use of his property, or seize that property pending resolution of the criminal trial. A defendant may be incarcerated pending trial, or released on conditions that restrict his ability to travel and his freedom of association. The government may suspend an indicted defendant from employment in federally regulated institutions, or suspend his ability to contract with

the government. Private employers may impose similar or harsher restrictions. Thus, the significant costs resulting from unwarranted indictments vastly exceed the incremental cost from application of the obligation to present substantial exculpatory evidence that clearly negates guilt in those circuits where it has not yet been required.

3. As the Tenth Circuit held, the trial court findings challenged by petitioner are not clearly erroneous. Accordingly, the judgment should be affirmed.

## ARGUMENT

### I. ADOPTION OF PETITIONER'S ARGUMENT WOULD FUNDAMENTALLY IMPAIR THE STRUCTURAL PROTECTIONS OF OUR GRAND JURY SYSTEM

The nationwide significance of the issue presented here is illustrated by the facts of a recent California case:

In August 1989, a Department of Justice Organized Crime Strike Force prosecutor summoned Dennis DiRicco to testify before a Los Angeles federal grand jury investigating allegations of payola in the record industry. As the prosecutor knew at the time, DiRicco had been tried the previous year in district court for the Northern District of California on charges involving money laundering and narcotics, had testified in his own defense, and been convicted on two counts and acquitted on eight others. Four months before that grand jury presentation the prosecutor had reviewed a transcript of DiRicco's trial testimony. That testimony reflected a complete, detailed denial of any of the wrongdoing about which DiRicco was to testify.

> "Personally handling the questioning of DiRicco, [the prosecutor] extracted a story from him that was diametrically opposed to his prior trial testimony in every important respect . . . Despite this dramatic 180 degree switch from DiRicco's former sworn trial testimony, [the prosecutor] failed to reveal any of that prior testimony to the Grand Jury . . . In



> fact, . . . the Government failed to tell the Grand Jury that DiRicco had *testified* at his trial, much less that a *transcript* had been prepared and was available." *United States v. Isgro*, 751 F.Supp. 846, 848 (C.D. Cal. 1990).

Without DiRicco's testimony, two of three defendants in *Isgro* could not have been indicted. *Id.* at 852. Yet if the argument advanced here by petitioner is accepted, prosecutors will be free to manipulate the grand jury to return an indictment through deliberate suppression of substantial exculpatory evidence that clearly negates a target's guilt. A prosecutor would be free to indict on the uncorroborated word of one witness, while simultaneously suppressing substantial exculpatory evidence — whether it be testimony of other witnesses, third party documentary evidence, or materials received from the target's counsel — that clearly negated the target's guilt. Or a prosecutor could selectively question a grand jury witness to elicit inculpatory testimony while consciously suppressing substantial exculpatory information about which he knows that witness would testify.[1] Such a result surely was not intended when the Fifth Amendment was added to our Constitution 200 years ago, nor should this Court countenance such practices. In the exercise of its supervisory authority to safeguard the independence of the grand jury and that institution's protection against overzealous prosecution, this Court should reject petitioner's argument and affirm the lower court decision at issue.

---

[1] *See, e.g., United States v. Short*, 1991 U.S. Dist. LEXIS 16380 (D.D.C. 1991); *United States v. Phillips Petroleum Co.*, 435 F.Supp. 610 (N.D. Okl. 1977).

## II. THE COURT OF APPEALS' STRAIGHTFORWARD APPLICATION OF ITS SUPERVISORY POWERS AND OF THIS COURT'S DECISION IN *BANK OF NOVA SCOTIA* SHOULD BE UPHELD

### A. The Duty to Present Substantial Exculpatory Evidence that Clearly Negates Guilt Fairly Protects the Interests of the Grand Jury, the Prosecution and the Court

The decision of the Court of Appeals reflects an unexceptional balancing of the grand jury's role as an independent and unbiased shield between the ordinary citizen and the overzealous prosecutor, the prosecutor's duty to present matters to the grand jury in a dispassionate and disinterested fashion, and the court's own supervisory authority to preserve the integrity and fairness of the criminal justice system.

#### 1. *Historic Role of the Grand Jury*

In the federal criminal justice system, the Fifth Amendment provides a check on prosecutorial discretion to initiate a felony prosecution. The Fifth Amendment provides that: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . ." The grand jury performs dual functions. It exists both to determine whether there is probable cause and to protect citizens from government overreaching. " '[T]he most valuable function of the grand jury [has been] not only to examine into the commission of crimes, but to stand between the prosecutor and the accused.' " *Hoffman v. United States,* 341 U.S. 479, 485 (1951), quoting *Hale v. Henkel,* 201 U.S. 43, 59 (1906). The grand jury's role as a shield is indispensable to our criminal system. For "[h]istorically [the grand jury] has been regarded as a primary security to the innocent against hasty, malicious and oppressive prosecution . . . standing between the accuser and the accused . . . to determine whether a charge is founded



upon reason or was dictated by an intimidating power or by malice and personal ill will." *Wood v. Georgia,* 370 U.S. 375, 390 (1962). Serving "its historic role as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor," its "mission is to clear the innocent, no less than to bring to trial those who may be guilty." *United States v. Dionisio,* 410 U.S. 1, 16-17 (1973). *See also United States v. Calandra,* 414 U.S. 338, 343 (1974); *Costello v. United States,* 350 U.S. 359, 362 (1956); *Ex parte Bain,* 121 U.S. 1, 11 (1887).

As part of its shielding function, the grand jury may charge lesser offenses, indict on one or more counts or on capital or non-capital offenses. Indeed, " '[t]he grand jury is not bound to indict in every case where a conviction can be obtained.' " *Vasquez v. Hillery,* 474 U.S. 254, 263 (1986) (quoting *United States v. Ciambrone,* 601 F.2d 616, 629 (2d Cir. 1979) (Friendly, J., dissenting)).

To perform its role within our constitutional structure, the grand jury must act independently of both prosecutor and judge and have virtually untrammeled investigatory powers. *Stirone v. United States,* 361 U.S. 212, 218 (1960) ("The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of fellow citizens acting independently of either prosecuting attorney or judge."). Yet, despite the recognized necessity of an independent grand jury, institutional limitations necessarily render the grand jury dependent upon the evidence presented and investigation conducted by the prosecution, particularly in modern times. A grand jury consists of ordinary citizens generally acting only part-time, who are not required to have any knowledge of the intricacies or complexities of either substantive or procedural criminal law. While historically possessed of great investigatory authority, the grand jury nevertheless relies in great part, if not entirely, upon the evidence, facts and law as presented by the prosecutor. *See, e.g., United States v. Sells Engineering, Inc.,* 463 U.S. 418, 430 (1983) ("Although

the grand jury may itself decide to investigate a matter or to seek certain evidence, it depends largely on the prosecutor's office to secure the evidence or witnesses it requires."); 1 Wright, *Federal Practice and Procedure,* Criminal 2d § 101 at 201-02 (1991) (same).[2] Grand jury subpoenas are issued by the United States Attorney's Office, after their issuance in blank by the Clerk of the Court. *See United States v. Martino,* 825 F.2d 754, 761 (3rd Cir. 1987); *Doe v. DiGenova,* 779 F.2d 74, 80 (D.C. Cir. 1985); *United States v. Santucci,* 674 F.2d 624, 627 (7th Cir. 1982), *cert. denied,* 459 U.S. 1109 (1983). Indeed, the grand jury does not necessarily approve or even have knowledge of a subpoena prior to its issuance. *Doe v. DiGenova,* 779 F.2d at 80.

Although these institutional limits hamper the grand jury's exercise of its independent investigatory powers, nevertheless the grand jury must be fully informed of the facts underlying suspected criminal activity if it is to perform its appointed constitutional duty. Given its role of determining the existence of possible criminal conduct and returning only "well-founded indictments," this Court has long noted that a grand jury inquiry cannot and should not be narrowly limited. *See, e.g., Branzburg v. Hayes,* 408 U.S. 665, 688 (1972); *Blair v. United States,* 250 U.S. 273, 282 (1919). Rather, a grand jury is entitled to and should investigate fully into possible criminal activity because such "thorough and extensive" investigations are in society's best interests. *Wood v. Georgia,* 370 U.S. at 392; *United States v. Calandra,* 414 U.S. at 344; *Branzburg v. Hayes,* 408 U.S. at 701. Such thorough and extensive investigations not only allow a grand jury to determine whether probable cause exists, but also permit the grand jury to serve as a shield against arbitrary

[2]In fact, some have advocated legislation which would permit the grand jury to employ special counsel and special investigators, and which would afford the grand jury a budget to pay for such services. *See* Note, *Powers of Federal Grand Juries,* 4 Stan. L. Rev. 68, 70-71 (1951).



accusations. *United States v. Mandujano,* 425 U.S. 564, 573 (1976) (plurality opinion) ("It is in keeping with the grand jury's historic function as a shield against arbitrary accusations to call before it persons suspected of criminal activity, so that the investigation can be complete.").

### 2. *Role of the Prosecutor*

Like the grand jury, it is the prosecutor's duty to investigate possible criminal activity in a dispassionate and disinterested manner. As this Court forcefully stated in *Berger v. United States,* 295 U.S. 78, 88 (1935):

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer."

Repeating those words in *Young v. United States ex. rel. Vuitton et Fils S.A.,* 481 U.S. 787, 803 (1987), this Court exercised its supervisory authority to apply the requirement of a disinterested prosecutor to district court appointment of private counsel to undertake a criminal contempt prosecution. Noting the expansive powers and wide-ranging discretion of "the citizen's primary adversary in a criminal proceeding," the Court reiterated the requirement that the prosecutor assess the propriety of criminal charges dispassionately. *Id.* at 805, 813-14.[3]

[3]This Court's holdings on a prosecutor's duties are echoed in ethical standards and guidelines of the American Bar Association, the Department of Justice and other organizations. *See, e.g.,* American Bar Association Project on Standards for Criminal Justice — The Prosecution Function, § 1.1(c) (1971) ("The duty of the prosecutor is to seek justice, not merely to convict."); ABA/BNA, *Lawyers' Manual on Professional Conduct,* Model Code of Professional Responsibility, DR 1-102(A)(5)(1991) ("A lawyer shall not: Engage in conduct that is prejudicial to the administration of justice.")

There is no dispute that prosecutors have wide latitude in evidentiary presentations made to a grand jury. *See United States v. Mechanik,* 475 U.S. 66, 74 (1986) (O'Connor, J., concurring). Thus, for example, prosecutors may present evidence to the grand jury that would be inadmissible at trial, so long as that presentation is not misleading. *See, e.g., United States v. Calandra,* 414 U.S. 338 (allowing presentation of illegally seized evidence); *Costello v. United States,* 350 U.S. 359 (allowing presentation of hearsay evidence).[4] Nonetheless, a prosecutor is not given unbridled authority; both Rule 6 of the Federal Rules of Criminal Procedure and the court's supervisory powers prevent prosecutors from impinging upon a grand jury's independence and from presenting the evidence in a deliberately misleading manner. *See, e.g., United States v. Mechanik,* 474 U.S. at 74-75 (O'Connor, J., concurring); *United States v. Udziela,* 671 F.2d 995, 998-99 (7th Cir.), *cert. denied,* 457 U.S. 1135 (1982) (collecting cases). Thus, for example, the prosecutor may not manipulate the process to insure that all witnesses testify in a consistent manner. *United States v. Mechanik,* 475 U.S. at 74 (O'Connor, J., concurring). This principle was reaffirmed by the Court in its decision in *Bank of Nova Scotia v. United States,* 487 U.S. 250 (1988), discussed below.

---

7 Department of Justice Manual 9-11.020 (1991) ("In his/her dealings with the grand jury, the prosecutor must . . . insure that justice is done and that guilt shall not escape nor innocence suffer."); National District Attorneys Association, *National Prosecution Standards,* Standard 2.3(A) (1977) ("The prosecutor has the duty to seek justice and improve the law, not merely to enforce the law.").

[4]Relying upon *Costello,* petitioner argues that requiring a court to determine whether substantial exculpatory evidence clearly negating guilt has been presented to a grand jury would require an impermissible weighing of sufficiency of the evidence presented to the grand jury. Brief for United States at 14, 17. Petitioner's argument is inapposite. At issue here and in the other cases cited at Section I.C.2, below, is not sufficiency of evidence but rather the conduct of the prosecutor, and whether he may mislead the grand jury through selective presentation of the evidence.



### 3. *The Court's Supervisory Powers*

This Court has invoked its supervisory powers to protect the integrity of the administration of justice. In *McNabb v. United States,* 318 U.S. 332 (1943), it declared that judicial supervision of the administration of criminal justice implied a duty of establishing and maintaining civilized standards of procedure and evidence, which the Court then applied to exclude illegally obtained admissions. *Id.* at 340, 346. The Court noted "that safeguards must be provided against the dangers of the overzealous" and that these safeguards both assure protection for the innocent and ensure that convictions are achieved by fair procedures. *Id.* at 343, 344, 347.

In the decades since *McNabb,* this Court has continued to exercise its supervisory authority to insure the integrity and fairness of the criminal justice system. Thus, for example, in *Ballard v. United States,* 329 U.S. 187 (1946), the Court dismissed indictments because the systematic exclusion of women from grand and petit jury panels departed from the scheme of jury selection adopted by Congress. In *Marshall v. United States,* 360 U.S. 310 (1959), the Court dismissed an indictment because several trial jurors had been exposed to prejudicial newspaper articles about the defendant. Although each juror maintained that he would not be influenced by the articles, the Court exercised its supervisory power, finding that proper enforcement of the criminal law in the federal courts required a new trial. In *Mesarosh v. United States,* 352 U.S. 1, 14 (1956), the Court reversed a conviction in light of evidence that a government witness had given untruthful testimony, similar in nature to his trial testimony, in other proceedings.

> "This is a federal criminal case, and this Court has supervisory jurisdiction over the proceedings of the federal courts. If it has any duty to perform in this regard, it is to see that the waters of justice are not polluted. Pollution having taken place here, the con-

dition should be remedied at the earliest opportunity."

On numerous other occasions, this Court has similarly invoked its supervisory power to protect the integrity of the criminal justice system.[5]

### B. This Court's Decision in *Bank of Nova Scotia*

In *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988), this Court made clear that a district court may properly invoke its supervisory power to dismiss an indictment for prosecutorial misconduct in a grand jury investigation, upon a showing that the misconduct substantially influenced the grand jury's decision to indict. The Court separated its earlier decisions on the standard for dismissal of grand jury indictments into two classes. One class, exemplified by the decisions in *Vasquez* and *Ballard*, included cases where "the structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair, allowing the presumption of prejudice." *Id.* at 257. The other class of cases where dismissal of the indictment would be appropriate were those where " 'it is established that the violation substantially influenced the grand jury's decision to indict' " or where "there is 'grave doubt' that the decision to indict was free from the substantial influence

---

[5] *See, e.g., Young v. U.S. ex. rel. Vuitton et Fils S.A.*, 481 U.S. at 808 ("use of this Court's supervisory authority has played a prominent role in ensuring that contempt proceedings are conducted in a manner consistent with basic notions of fairness."); *Vasquez v. Hillery*, 474 U.S. 254 (racial discrimination in the selection of grand jurors rendered grand jury proceedings fundamentally unfair); *United States v. Sells Engineering, Inc.*, 463 U.S. 418 (invoking supervisory powers to deter threat to integrity of grand jury proceedings by disclosure of such proceedings for civil litigation); *McCarthy v. United States*, 394 U.S. 459 (1969) (exercising supervisory power to allow a defendant to plead anew when a district judge accepted a guilty plea without fully adhering to the procedure set forth in Federal Rule of Criminal Procedure 11).



of such violations." *Id.* at 256 (quoting *United States v. Mechanik*, 475 U.S. at 78 (O'Connor, J., concurring)).

In *Bank of Nova Scotia*, this Court suggested that a showing that the prosecutor had manipulated a witness' testimony, or knowingly participated in a "misleading and inaccurate" grand jury presentation could give rise to a finding of prejudice. 487 U.S. at 260-61, 262. Because no such showing was made there, the Court did not consider whether under the facts of that case such misconduct had an effect on the grand jury's decision to indict. Similarly, while the Court stated that infringement of a grand jury's independence may result in grave doubt as to a violation's effect on the grand jury's decision to indict, that issue was not presented either. *Id.* at 259.

The standard for determining prejudice and the requirement that the prosecutor know of the misleading and inaccurate nature of the grand jury presentation, as stated in *Bank of Nova Scotia*, parallel the standard for presentation of exculpatory evidence articulated by lower courts. The Tenth Circuit, as well as other courts that require that the prosecutor present exculpatory evidence to the grand jury, anticipated this Court's decision in *Bank of Nova Scotia*. In all instances, courts require that the prosecutor possess or know of the evidence in question before dismissing an indictment. And the indictment will not be dismissed unless the exculpatory evidence is so substantial that it clearly or directly negates the target's guilt — a formulation equivalent to this Court's finding of prejudice where the indictment decision was substantially influenced by the violation at issue, or where there is grave doubt that the indictment decision was free from such substantial influence.

The district court here found that the failure of the prosecution to present to the grand jury substantial exculpatory evidence in its possession rendered the grand jury's decision to indict gravely suspect. Pet. App. 23a, 26a. This finding represented a straightforward applica-

tion of the Court's supervisory power, as then recently articulated in *Bank of Nova Scotia*.

### C. The Requirement that Prosecutors Present Substantial Exculpatory Evidence that Clearly Negates the Target's Guilt is Consistent with this Court's Prior Exercise of Supervisory Powers

#### 1. *Development of the Standard*

The principles articulated by those courts that require a prosecutor to present substantial exculpatory evidence that clearly negates guilt are in accord with this Court's statements that a prosecutor may not act in a manner that infringes a grand jury's independence, and its exercise of supervisory powers to safeguard the institutional integrity of our criminal justice system. The two important principles are: First, a prosecutor does not have unbridled discretion, for such discretion would make a mockery of a prosecutor's duty of fairness and render the grand jury meaningless as a check on prosecutorial conduct. Second, the prosecution is not permitted to mislead the grand jury through selective presentation of the evidence. In *United States v. Ciambrone*, 601 F.2d 616 (2d Cir. 1979), the Second Circuit articulated the scope of a prosecutor's obligation to present exculpatory evidence to a grand jury. In *Ciambrone*, the court reiterated the duty of the grand jury to protect against unfounded or unsupported charges, while recognizing the grand jury's heavy dependence on the United States Attorney as its investigator and legal advisor. *Id.* at 622. While noting that a prosecutor was not obligated to search for evidence favorable to the defense or negating guilt, absent request by the grand jury, and that the defendant did not have a right to present his version of the facts before the grand jury, the court nonetheless declared that the prosecutor did not have unbridled discretion:

> "[T]he prosecutor's right to exercise some discretion and selectivity in the presentation of evidence to a grand jury does not entitle him to mislead it or to engage in fundamentally unfair tactics before it. The prosecutor, for instance, may not obtain an indictment on the basis of evidence known to him to be perjurious . . . or by leading it to believe that it has received eyewitness rather than hearsay testimony . . . We would add that where a prosecutor is aware of any substantial evidence negating guilt he should, in the interest of justice, make it known to the grand jury, at least where it might reasonably be expected to lead the jury not to indict." *Id.* at 623 (citations omitted).



The essential elements of this obligation to present exculpatory evidence have now been repeated in numerous published decisions by circuit courts of appeals and by district courts. First, a prosecutor is not required to search for exculpatory evidence, or to present all evidence that might be considered exculpatory. Second, as part of its obligation not to mislead the grand jury or to otherwise engage in fundamentally unfair tactics, the prosecution must make available or present to the grand jury substantial exculpatory evidence that clearly negates the target's guilt. Third, this obligation extends only to information in the possession of or otherwise known to the prosecutor. *See, e.g., United States v. Reid*, 911 F.2d 1456, 1460 (10th Cir. 1990), *cert. denied*, 111 S.Ct. 990 (1991); *United States v. Casamento*, 887 F.2d 1141, 1183 (2d Cir. 1989), *cert. denied*, 493 U.S. 1081 (1990); *Hochman v. Rafferty*, 831 F.2d 1199, 1204 (3d Cir. 1987), *cert. denied*, 485 U.S. 1022 (1988); *United States v. Page*, 808 F.2d 723, 727 (10th Cir. 1987), *cert. denied*, 482 U.S. 918 (1987); *United States v. Lame*, 716 F.2d 515, 518 (8th Cir. 1983); *United States v. Flomenhoft*, 714 F.2d 708, 712 (7th Cir. 1983), *cert. denied*, 465 U.S. 1068 (1984).

The requirement that prosecutors must present substantial exculpatory evidence clearly negating a target's guilt effectively safeguards the grand jury's independence and acts as a check on prosecutorial conduct without converting the grand jury process into a second trial on

the merits, or burdening the trial courts. The standard articulated establishes a "difficult burden" on defendants. *E.g., United States v. Reid*, 911 F.2d at 1460; *United States v. Gavran*, 620 F.Supp. 1277, 1281 (E.D. Wis. 1985), *aff'd* 845 F.2d 1023 (7th Cir. 1988); *United States v. Dorfman*, 532 F.Supp. 1118, 1132 (N.D. Ill. 1981). As articulated in *United States v. Gavran*, 620 F.Supp. at 1281, quoting from *United States v. Dorfman:*

> "The desired effect of the 'clearly negates' test is to 'eliminate most of the problems involved with having to determine what might be considered exculpatory in the abstract, while still not permitting prosecutors to undermine completely the grand jury's function as a check on prosecutorial power.' "

### 2. *The Standard Appropriately Applies the Court's Supervisory Authority*

A sampling of published lower court decisions illustrates that dismissal of an indictment for failure to present such substantial exculpatory evidence is a proper exercise of a court's supervisory power to maintain the integrity of the criminal justice system.

In *United States v. Isgro*, 751 F.Supp. 846, summarized earlier, the district court reiterated, as this Court has many times before, that the grand jury's independence must be carefully guarded; otherwise the grand jury would become a "rubber stamp" for the wishes of the prosecutor and its indictment would be the prosecutor's decision and not that of the grand jury:

> "If the presentation to the Grand Jury is done unfairly and essential information is withheld, the Grand Jury is thus unable to make a decision based on a fair assessment of the evidence." *Id.* at 850.

Applying the prejudice standard enunciated in *Bank of Nova Scotia*, the court dismissed the indictment both on constitutional grounds and through exercise of its supervisory powers.



In *United States v. Lawson*, 502 F.Supp. 158 (D.Md. 1980), Lawson, a pharmacist, was indicted for filling fictitious prescriptions. Another pharmacist was a key witness before two successive grand juries. In his initial testimony, the pharmacist related that Lawson had attempted to verify the accuracy of the prescriptions, and in fact the witness had been present when Lawson had placed telephone calls attempting to verify the accuracy. During the interim between the witness' testimony between the first grand jury and his appearance before a different grand jury, the government subpoenaed telephone records that corroborated the witness' testimony. Nonetheless, the prosecutor failed to reveal to the second grand jury that he had obtained this corroborating evidence and, in fact, tried to discredit the witness. The court found that the presentation before the second grand jury — where substantially exculpatory telephone records were concealed and the witness was asked deliberately misleading questions calculated to create a false impression — required dismissal of the indictment. *Id.* at 172.

In *United States v. Provenzano*, 440 F.Supp. 561 (S.D.N.Y. 1977) the indictment was dependent upon the reliability of one key witness. After the initial indictment and prior to a superseding indictment, the witness recanted his testimony, informing the prosecutor of his doubts about the accuracy of his prior testimony. Nonetheless, the government presented the case to a second grand jury based solely on the transcript of the witness' testimony before the earlier grand jury, and concealed his subsequent doubts regarding the reliability of that testimony. This failure to present substantial exculpatory evidence was found to have deprived the grand jury of an opportunity to make an independent evaluation of the evidence, "misleading the grand jurors as to the 'shoddy merchandise' they were getting." *Id.* at 565.

Finally, in *United States v. Phillips Petroleum Co.*, 435 F.Supp. 610 (N.D. Okl. 1977), defendant company was charged with intentionally filing false tax returns. A key

witness before the grand jury was the employee principally responsible for handling the tax issue in question. After he had completed his first day of testimony, in a recorded interview with the prosecutor that evening, the witness attributed the failure to report the taxes properly to his own carelessness, rather than to any intentional action by the company. When the witness resumed his testimony before the grand jury the next day, the prosecutor failed to reveal this substantially exculpatory explanation, an explanation that the court found clearly tended to negate elements of the crime. *Id.* at 619, n.1. The court stated that the grand jury should have been apprised of this testimony in order to make its independent judgment, and found that it was likely the indictment would never have been returned had the exculpatory statements been disclosed. *Id.* at 619-620.

Were this Court to agree with petitioner that a prosecutor need not present substantial exculpatory evidence that clearly negates guilt, each of the foregoing illustrative cases necessarily would be incorrectly decided. Sanctioning such prosecution conduct would have drastic consequences for a grand jury's independence. By skewing the evidence, the prosecution would effectively deprive the grand jury of its ability to perform either of its functions: it could neither form an independent judgment that the evidence warrants a finding of probable cause nor exercise its powers to protect the innocent from government overreaching.

Just as failure to disclose the possible interest of a witness in testifying falsely at trial can adversely affect a defendant's life or liberty, *see Napue v. Illinois*, 360 U.S. 264, 269 (1959), so too can knowing concealment of substantially exculpatory testimony have drastic consequences for the target of a grand jury investigation. As this Court recognized in *Brady v. Maryland*, 373 U.S. 83, 87-88 (1963):

> "A prosecution that withholds evidence . . . which, if made available, would tend to exculpate him or



> reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not compare with the standards of justice. . . ."

## III. THE REQUIREMENT THAT A PROSECUTOR PRESENT SUBSTANTIALLY EXCULPATORY EVIDENCE THAT CLEARLY NEGATES A TARGET'S GUILT IMPOSES NO SIGNIFICANT BURDEN AND REASONABLY BALANCES COMPETING INTERESTS

### A. Petitioner Fails To Demonstrate Any Significant Burden

Petitioner contends that the obligation to present substantial exculpatory evidence that clearly negates guilt would impose significant burden on the judicial system, vastly outweighing any marginal benefit. Petitioner claims that (1) courts would devote more time and effort in processing pretrial motions; (2) the standard is extremely difficult for prosecutors to follow or courts to apply; (3) prosecutors already have sufficient incentive not to seek an indictment where the chance of conviction is remote; (4) this obligation would significantly impact prosecution of white collar crime; and (5) any failure to present known exculpatory evidence that likely would have led the grand jury not to indict can be addressed as a violation of internal guidelines.

#### 1. *Claimed impact on judicial resources*

This supposed burden is neither borne out in practice or theory. Within the last 15 years, district courts across the country and at least five circuit courts of appeals have required prosecutors who know of substantial exculpatory evidence that clearly negates guilt to present that evidence to a grand jury. In addition, at least 15 states, either by statute or by case law, similarly require a

prosecutor to present such evidence to a grand jury.[6] Moreover, as quoted in the next section, it is internal Department of Justice policy to apply this standard. Yet despite the many years during which courts have imposed this requirement, petitioner cannot identify evidence of any demonstrable, adverse impact on the functioning of the criminal justice system, nor any widespread expression of difficulty in interpreting this requirement.

Moreover, the Court's decision in *Bank of Nova Scotia* already recognizes that supervisory authority may be invoked in pre-trial motions to dismiss an indictment for prosecutorial misconduct in a grand jury investigation. Given the nationwide application of *Bank of Nova Scotia,* it is unreasonable to conclude that application of the duty to present substantial exculpatory evidence that clearly negates guilt in those circuits that have not yet adopted the rule will significantly affect the volume of pre-trial motions.

---

[6] *See, e.g.,* Alaska: *Nelson v. State*, 628 P.2d 884, 887 (Ala. 1981); *Frink v. State*, 597 P.2d 154, 164 (Ala. 1979); Arizona: *State v. Coconino County Superior Court*, Div. II, 139 Ariz. 422, 678 P.2d 1386, 1389 (1984); California: *Johnson v. Superior Court*, 15 Cal.3d 248, 255, 124 Cal.Rptr. 32, 539 P.2d 792 (1975); Connecticut: *State v. Couture*, 194 Conn. 530, 482 A.2d 300, 315 (1984), *cert. denied*, 469 U.S. 1192 (1985); District of Columbia: *Miles v. United States*, 483 A.2d 649 (D.C. 1984); Hawaii: *State v. Adams*, 64 Haw. 568, 645 P.2d 308, 311 (1982); *State v. Bell*, 60 Haw. 241, 589 P.2d 517, 521 (1978); Massachusetts: *Commonwealth v. Mayfield*, 398 Mass. 615, 500 N.E.2d 774, 778 (1986); Minnesota: *State v. Moore*, 438 N.W.2d 101, 105 (1989); Nevada: *Ostman v. Eighth Judicial District Court*, 816 P.2d 458, 459 (Nev. 1991); New Mexico: *Buzbee v. Donnelly*, 96 N.M. 692, 634 P.2d 1244, 1251 (1981); New York: *People v. Scott*, 150 Misc.2d 297, 568 N.Y.S.2d 857 (N.Y. Sup. Ct. 1991); *People v. Abbatiello*, 129 Misc. 2d 831, 494 N.Y.S.2d 625 (N.Y. Sup. Ct. 1985); North Dakota: *State v. Nordquist*, 309 N.W.2d 109, 118 (N.D. 1981); Oklahoma: 22 Okl. Stat. Ann. § 335; Oregon: *State v. Harwood*, 45 Or. App. 931, 609 P.2d 1312, 1316-17 (1980); Utah: *Strehl v. District Court of Salt Lake County*, 558 P.2d 597, 598-99 (Utah 1976).



### 2. *Claimed difficulty in following or applying the standard*

The standard articulated by the lower courts is objective, and involves legal determinations similar to those made every day by trial judges. A defendant seeking to dismiss an indictment for failure to present substantial exculpatory evidence must show the following: (1) Specified evidence allegedly was not presented to the grand jury; (2) The evidence is substantial and clearly negates the defendant's guilt; and (3) The prosecutor possessed or otherwise knew of the evidence before indictment.

Application of the three requirements is straightforward. A defendant arguing that the prosecutor had knowledge of the evidence at issue would establish how and when the evidence came into the prosecutor's possession. These objective facts will generally not be in dispute. Similarly, whether the allegedly exculpatory evidence was presented to the grand jury is not difficult to determine. If it has not been presented, the prosecutor will acknowledge that fact. If it has been presented, the prosecutor can direct the court's attention to the specific evidence without compromising grand jury secrecy.

Whether the evidence is substantially exculpatory and clearly negates guilt is no different than determinations that trial and appellate courts make on a daily basis, in such decisions as motions for judgment of acquittal under Federal Rule of Criminal Procedure 29, appellate challenges to sufficiency of the evidence, or in post-trial motions alleging the failure to disclose material exculpatory evidence as required by *Brady v. Maryland*. *Cf. United States v. Bagley*, 473 U.S. 667 (1985).

Nor is practical application of the standard complicated. The trial judge would have before him the grand jury indictment, setting forth the alleged crimes and the manner of their commission. The trial judge can objectively determine by comparison of the indictment with the allegedly exculpatory evidence whether in fact such evidence is substantial and clearly negates an element of the

alleged crime. Again, trial and appellate courts have considered such challenges to indictments in dozens of reported decisions and presumably in hundreds of unreported instances. Application of this requirement in those courts that do not currently require presentation of such evidence will impose no significant burden.

Nor is this obligation difficult for prosecutors to apply, unless petitioner contends that prosecutors are incapable of following existing Department of Justice policy. It is already internal Department of Justice policy that:

> "when a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence which directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person." 7 Department of Justice Manual 9-11.233 (1991).

This formulation is echoed by the American Bar Association in its Standards Relating to the Prosecution Function[7] and in its Grand Jury Policy and Model Act,[8] as well

---

[7]American Bar Association Project on Standards for Criminal Justice — The Prosecution Function, § 3.6(b) (1971): "The prosecutor should disclose to the grand jury any evidence which he knows will tend to negate guilt."

[8]ABA Grand Jury Policy and Model Act (1982). Principle 3 provides: "No prosecutor shall knowingly fail to disclose to the grand jury evidence which will tend substantially to negate guilt." Draft Statute § 101 provides:

> "Prosecutor's Duty to Disclose Exculpatory Evidence To the Grand Jury
>
> 1. If the prosecutor is aware of exculpatory evidence, that is, evidence which, if believed, tends to negate one of the material elements of the crime, he must disclose and if feasible present such evidence to the grand jury.
>
> 2. If the prosecutor is aware of exculpatory evidence which bears upon a possible affirmative defense that, if believed, raises a reasonable doubt about the defendant's guilt, he should alert the grand jury to its existence and inform them of their right to call for such evidence.



as in the National Prosecution Standards adopted by the National District Attorney's Association.[9]

### 3. *The Claim That Prosecutors Already Have Sufficient Incentive Not To Indict When A Conviction Is Remote*

Petitioner claims that prosecutors would not seek indictment where the chances of conviction are remote, citing *United States v. Calandra,* 414 U.S. at 351, and that this provides a sufficient check on prosecutorial conduct. Brief for the United States at 25. Of course, this statement applies with equal force to an argument that grand juries are unnecessary, for if a prosecutor would not indict where a conviction was remote, arguably a grand jury check on prosecutorial discretion would be superfluous. Yet when this country's leaders approved the Bill of Rights, they included the requirement that no felony prosecution could commence unless an indictment was presented by a grand jury. As this Court has articulated over the past 200 years, the naked claim that a prosecutor would not seek indictment in a marginal case is simply insufficient justification for granting prosecutor's unbridled discretion over grand jury presentations.

---

> 3. After arraignment upon an indictment, the court, upon motion of the defendant made within [30] days after the entry of a not guilty plea, may dismiss any indictment where the prosecutor knowingly failed to disclose exculpatory evidence of the type defined in section 1. The court should not dismiss an indictment because of the prosecutor's failure to disclose exculpatory evidence of the type defined in section 2 unless the court determines that such omitted exculpatory evidence was so compelling that indictment by the grand jury was not justified upon the evidence presented."

[9]National District Attorneys Association, *National Prosecution Standards* (1977). Standard 14.2(D) provides: "The prosecutor should disclose to the grand jury any evidence which he knows will tend to negate guilt or preclude the finding of an indictment."

#### 4. *Impact of this obligation on white collar prosecution*

Petitioner claims that requiring presentation of substantial exculpatory evidence that clearly negates guilt would pose particularly acute burdens in white collar criminal cases. Brief for the United States at 27. Again, this speculative harm finds no support in actual practice.

First, as illustrated by many reported decisions and as is particularly true in white collar criminal prosecutions, it is rarely a mystery what evidence a defendant believes should be presented to the grand jury. It is the rule, rather than the exception, in white collar investigations, that prosecutors and defense counsel discuss the conduct under investigation well before an indictment is returned. Defense counsel routinely asks or is invited to present facts militating against indictment. In fact, many reported decisions acknowledge the existence of such on-going communication. *See, e.g., United States v. Flomenhoft,* 714 F.2d at 710-11 (government asked defendant what information he desired be presented to grand jury; defendant identified evidence and requested that ten specific witnesses be called to testify); *United States v. Ciambrone,* 601 F.2d at 625 (defendant invited to testify before grand jury and defense counsel given opportunity to submit his views or contentions); *United States v. Law Firm of Zimmerman & Schwartz, P.C.,* 738 F.Supp. 407, 411 (D.Col. 1990), *rev'd on other grounds sub. nom. United States v. Brown,* 943 F.2d 1246 (10th Cir. 1991) (prosecutor tendered to grand jury detailed letters with supporting exhibits presented by defense counsel to explain why the evidence did not support an indictment, as well as character witness for defendant and defendant's proposed instructions on the law); *United States v. Moon,* 532 F.Supp. 1360, 1367-68 (S.D.N.Y. 1982) (defense counsel provided prosecutor with binder containing affidavits of nineteen witnesses who assertedly corroborated defense claims); *United States v. Dorfman,* 532 F.Supp. at 1130 (defense counsel provided government with copies of



polygraph examination reports); *United States v. Roberts,* 481 F.Supp. 1385, 1386-87 (C.D.Cal. 1980) (defense counsel presented specific exculpatory evidence to prosecutor and made pretrial motion for order requiring presentation of such evidence).

Second, petitioner fails to mention that many white collar prosecutions are the subject of parallel civil proceedings. With the extension of statutes of limitations for prosecution of many white collar offenses,[10] it has become increasingly more common for civil proceedings to precede criminal prosecution, and in many instances reach a conclusion before indictment.[11] Existence of such parallel proceedings has prompted prosecutors to intervene in those proceedings and to seek access to discovery materials covered by protective order.[12] Review of such plead-

---

[10] *See, e.g.,* Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), Pub. L. 101-73, § 963, 103 Stat. 504 (1989), codified as amended at 18 U.S.C.A. § 3293 (Supp. 1991), extending the statute of limitations for crimes affecting financial institutions from five to ten years; Comprehensive Thrift and Bank Fraud Prosecution and Taxpayer Recovery Act of 1990, Pub. L. 101-647, § 2505, 104 Stat. 4789 (1990), codified as amended at 18 U.S.C.A. § 3293 (Supp. 1991), extending FIRREA's special ten year statute of limitations to violations of the RICO statute to the extent the racketeering activity includes a violation of the bank fraud statute.

[11] Thus, for example, while a prosecutor may wait a maximum of ten years to prosecute a defendant for commission of a crime affecting a financial institution, a plaintiff alleging securities fraud against an officer of a financial institution must commence his action within the earlier of "one year after discovery of the facts constituting the violation and within three years after such violation." *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson,* 111 S.Ct. 2773, 2782, 115 L.Ed.2d 321, 336 (1991). Similarly, if the bank officer's criminal conduct forms the basis for a civil breach of fiduciary duty claim, the state statute of limitations will expire well before the deadline for criminal prosecution. *E.g.,* Cal.Code Civ. Proc. § 343 (4 years).

[12] For example, prior to completion of any criminal investigation, the United States Attorney's office intervened in civil litigation in Arizona, involving Lincoln Savings, *In re American Continental Cor-*

ings as answers and summary judgment motions and attendance at court hearings generally removes any mystery as to what evidence the defendant considers substantially exculpatory.[13] Thus, petitioner's anxiety as to white collar investigations is profoundly misplaced.[14]

---

*poration/Lincoln Savings and Loan Securities Litigation*, U.S. Dist. Ct., D.Az., MDL Docket No. 834, and in civil litigation in California involving Columbia Savings. *In re Consolidated Columbia Savings and Loan Actions*, U.S. Dist. Ct., C.D. Cal., Master File No. CV 89-6538 SVW (Ex). Intervention is permitted by Federal Rule of Civil Procedure 24. *See Martindell v. International Tel. & Tel. Corp.*, 594 F.2d 291, 294 (2d Cir. 1979).

Similarly, efforts by prosecutors to gain access to civil discovery materials subject to protective orders have occasionally been successful. *See In re Grand Jury Subpoena Duces Tecum*, 836 F.2d 1468 (4th Cir.), *cert. denied*, 487 U.S. 1240 (1988); *United States v. Davis*, 702 F.2d 418 (2d Cir.), *cert. denied*, 463 U.S. 1215 (1983), *United States v. GAF Corp.*, 596 F.2d 10 (2d Cir. 1979). *But see In re Grand Jury Subpoena Duces Tecum Dated April 19, 1991*, 945 F.2d 1221 (2d Cir. 1991); *Martindell*, 594 F.2d 291.

[13]With increasing frequency, former officers of financial institutions are subject to litigation commenced both by the Federal Deposit Insurance Corporation, on behalf of the Resolution Trust Corporation, and by the Office of Thrift Supervision of the Department of Treasury. By statute, these agencies may have access to grand jury materials, *see* 18 U.S.C.A. § 3322(a), and by regulation financial institutions are required to make criminal referrals both to law enforcement and regulators. *E.g.*, 12 C.F.R. § 563.180(d). Thus in practice there is considerable coordination between regulators and prosecutors. The civil litigation referred to in the previous footnote has included claims presented by the FDIC and OTS, as well as by private plaintiffs.

[14]Amicus does not suggest that the likely defense is always known in white collar prosecutions, or that there is always an open dialogue between the prosecution and defense lawyers. However, in practice there is much greater disclosure and less mystery in these cases, contrary to the blanket statement that white collar cases present special concern.



### 5. *The claim that administrative remedies provide a sufficient safeguard against grand jury abuse*

Both the standard articulated by the lower courts and *Bank of Nova Scotia* require a showing of prejudicial impact on the decision to indict. Knowledge that a prosecutor may suffer some administrative consequence will do little to remedy the harm suffered by the defendant. Moreover any modest impact from application of this rule is warranted given the importance of safeguarding the independence of the grand jury.

## B. The Penalties And Injuries Attendant To An Indictment Justify Any Additional Burden

Petitioner's reassurance that prosecutors would not seek indictment when the chance of conviction is remote is little solace for those whose indictments are substantially influenced by the failure to present substantial exculpatory evidence that clearly negates guilt. An indictment bears its own penalties that often will not be cured by any subsequent acquittal, however swift. "The pendency of the indictment may subject [a defendant] to public scorn and deprive him of employment, and almost certainly will force curtailment of his speech, associations and participation in unpopular causes." *Klopfer v. North Carolina*, 386 U.S. 213, 222 (1967). "[W]hile in theory a trial provides the defendant with a full opportunity to contest and disprove the charges against him, in practice the handing up of an indictment will often have a devastating personal and professional impact that a later dismissal or acquittal can never undo." *United States v. Serubo*, 604 F.2d 807, 817 (3d Cir. 1979).[15]

---

[15]Moreover, at the time of the grand jury presentation, there has not yet been any determination of probable cause. This Court recently reiterated the consequences for an individual detained without an impartial determination of probable cause:

> "prolonged detention based on incorrect or unfounded suspicion may unjustly 'imperil a suspect's job, interrupt his source of income, and impair his family relationships.'" *County of River-*

Upon issuance of an indictment, the government may limit a defendant's use of his property or seize property pending resolution of the criminal trial. *See, e.g.*, 21 U.S.C.A. §§ 853(e) and (f) (Supp. 1991). A defendant may be incarcerated pending trial or released on conditions that restrict his ability to travel and his freedom of association. The government may suspend an indicted defendant from employment in federally regulated institutions, *see, e.g., FDIC v. Mallen*, 486 U.S. 230 (1988), or suspend his ability to contract with the government. *See, e.g.*, 48 C.F.R. 9.407-2(b) (1990). The government may suspend its own employees pending the outcome of the criminal trial. *See, e.g., White v. United States Postal Service*, 768 F.2d 334 (Fed. Cir. 1985). And, of course, private employers may impose similar or harsher restrictions.

Simply put, acquittal does not expunge the memory or eradicate any imprint of an indictment. The significant individual, judicial and societal costs resulting from unwarranted indictments vastly exceed any incremental cost from application of this obligation in those circuits where it has not yet been required.

## IV. THE COURT SHOULD AFFIRM DISMISSAL OF RESPONDENT'S INDICTMENT

For the foregoing reasons, this Court should uphold the Tenth Circuit requirement that prosecutors present to the grand jury substantial exculpatory evidence that clearly negates the target's guilt, as first articulated in *United States v. Page*, 808 F.2d at 727-28. Petitioner flyspecks the Tenth Circuit opinion in this case to create a false issue, namely a claim that use of such words as "consistent with the possible theory" or "relevant to any reasonable theory" suggests application of a different standard in the present case than was applied in *Page*. Brief for the United States at 29. When properly considered in context,

---

*side v. McLaughlin*, 111 S.Ct. 1661, 1668, 114 L.Ed.2d 49, 60 (1991) (citation omitted).



it is clear that the Tenth Circuit did not deviate in this case from its decision in *Page*. This is confirmed by subsequent Tenth Circuit citation to this case and articulation of the standard enunciated in *Page*. *See United States v. Reid*, 911 F.2d at 1460.

The trial court found that specific evidence known to the government — general ledgers and tax records obtained from respondent's accounting firm and written materials including the five volume deposition of respondent generated in bankruptcy proceedings — contained substantial exculpatory information and should have been presented to the grand jury. On appeal, the Tenth Circuit was bound by these factual findings unless clearly erroneous. Because the withheld evidence was consistent with reasonable defense theories, the Tenth Circuit correctly determined that the district court's findings were not clearly erroneous. For the reasons expressed in respondent's brief on the merits, amicus NACDL agrees that the district court findings are not clearly erroneous and thus this Court should affirm.

## CONCLUSION

Requiring prosecutors to present substantial exculpatory evidence that clearly negates guilt provides an important safeguard against erosion of the grand jury's independence. If petitioner's argument is adopted, a prosecutor in his unbridled discretion can manipulate his grand jury presentation to convey a false and inaccurate portrait of the events the grand jury is charged to consider in independent and impartial fashion. If the grand jury as an institution is to serve its function as a shield against the whims of the overzealous prosecutor, petitioner's argument must be rejected. The judgment of the Court of Appeals should be affirmed.

December 1991 Respectfully submitted,

DAN MARMALEFSKY
WARRINGTON S. PARKER III
LAURA FASHING
HUFSTEDLER, KAUS & ETTINGER

*Counsel for Amicus Curiae*
*National Association of*
*Criminal Defense Lawyers*